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In the Supreme Court of the United States

OCTOBER TERM, 1995

CARGILL, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers' exercise of Clean Water Act jurisdiction over isolated seasonal ponds used by migratory birds rests on a reasonable interpretation of the Act.

2. Whether the exercise of Clean Water Act jurisdiction over isolated waters of the United States that are used by migratory birds is constitutional.

3. Whether language in a preamble to regulations implementing the Clean Water Act, which explains that the use of waters by migratory birds can establish the required nexus with interstate or foreign commerce to support federal jurisdiction, is subject to the notice-and-comment requirements of the Administrative Procedure Act.

4. Whether a court is required under Section 309 of the Clean Water Act to assess a civil penalty in every case in which the court finds a violation of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 55 F.3d 1388. The final judgment of the district court (Pet. App. A20-A26) is not reported. The most recent opinion of the district court (Pet. App. A27-A37) is reported at 820 F. Supp. 478. The opinion of the court of appeals on the initial appeal (Pet. App. A38-A53) is reported at 896 F.2d 354. The order of this Court denying the initial petition for a writ of certiorari (Pet. App. A88) is reported at 498 U.S. 1126. The initial opinion of the district court (Pet. App. A54-A85) is reported at 700 F. Supp. 476.

An earlier opinion of the district court on a procedural matter is reported at 660 F. Supp. 183.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. The petition for a writ of certiorari was filed on July 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. 1251(a). One of the chief goals of the CWA is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 101(a)(2), 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. §§ 301(a) and 502(12)(A), 33 U.S.C. 1311(a) and 1362(12)(A). The statute provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. 1362(7). The Conference Report accompanying the legislation explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Discharge of dredged or fill material into "navigable waters" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to

Section 404 of the CWA, 33 U.S.C. 1344. Regulations implementing the Corps' Section 404 permitting authority were first published on April 3, 1974. 39 Fed. Reg. 12,115 (1974). Those regulations defined the term "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974). See also 33 C.F.R. 209.260(e)(1) (1974) (explaining that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor").

The Corps' initial interpretation of the scope of its Section 404 jurisdiction met with substantial opposition. The Environmental Protection Agency (EPA) interpreted the CWA as a congressional assertion of significantly broader federal jurisdiction than would be encompassed by the traditional definition of "navigable waters." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers).[1] As the Corps later explained, its initial regulations raised concerns about the lack of protection for "isolated

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[1] The EPA administers the CWA except as otherwise explicitly provided. § 101(d), 33 U.S.C. 1251(d). The Attorney General has determined that the "ultimate administrative authority to determine the reach of the term 'navigable waters' for purposes of § 404" resides with the EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979).

wetlands, and potholes whose degradation, destruction, and disappearance continues to increase at alarming rates." 42 Fed. Reg. 37,123-37,124 (1977). Several federal courts considering the coverage of wetlands adjacent to other waters agreed that the Corps had given Section 404 a more restrictive reading than was intended by Congress. See, *e.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974).[2] In *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that, when Congress enacted the CWA in 1972, it "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Ibid.*

In response to the district court's order in *Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31,320 (1975); see 33 C.F.R. 209.120(d)(2) and (e)(2) (1976). The interim regulations revised the definition of "waters of the United States" to include, *inter alia*, waters that are not adjacent to navigable waters (sometimes referred

[2] Shortly after the *Holland* decision, the House Committee on Government Operations expressed the view that the Corps' narrow view of its jurisdiction under Section 404 did not comport with congressional intent. The Committee called upon the Corps to adopt the broader view taken by the EPA and by the court in *Holland*. H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974).

to as "isolated waters"). 33 C.F.R. 209.120(d)(2)(i) (1976). On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim regulations to clarify many of the definitional terms. 42 Fed. Reg. 37,122 (1977). The 1977 final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[3] The regulation in its current form contains substantially similar language. See 33 C.F.R. 328.3(a)(3).[4]

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 permit program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded the scope of its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the

[3] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal Government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

[4] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In its discussion of the regulations, the Corps observed that the "EPA has clarified that waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*[5]

2. a. Petitioner Cargill, Inc., the corporate successor to Leslie Salt Co., owns a 153-acre tract of land southeast of San Francisco. The property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. Pet. App. A2. Until 1959, Leslie Salt used the property for salt manufacturing. The eastern part of the property contains pits that were used to collect calcium chloride, and the western part contains shallow basins that were used for crystallizing salt. *Ibid.* During the winter and spring both the pits and the crystallizers fill with water. *Ibid.* Migratory birds use the ponds for habitat. *Id.* at A40.

b. In late 1985, the Corps learned that petitioner had begun discharging fill in connection with the construction of a ditch and a siltation pond on the property. Pet. App. A40-A41. The Corps issued a cease-and-desist order pursuant to its authority

[5] The Corps' discussion indicates that potential, rather than actual, use by migratory birds is sufficient to trigger the Section 404 permit requirement. See 51 Fed. Reg. 41,217 (1986) ("waters of the United States" include waters "which are or would be used" by migratory birds). In the present case, however, it is undisputed that the waters at issue are actually used by migratory birds.

under Section 404 of the CWA. Pet. App. A41.[6] Rather than apply for a permit, Leslie Salt filed suit, challenging the Corps' assertion of jurisdiction. *Id.* at A42. That suit was later consolidated with an enforcement action brought by the United States. *Ibid.*

After a trial, the district court ruled that the Corps had no jurisdiction over any of the property. Pet. App. A54-A85. The court concluded, in particular, that the crystallizers and pits were not encompassed by the "other waters" subsection, 33 C.F.R. 328.3(a)(3) (see note 4, *supra*), of the regulatory definition of "waters of the United States." Pet. App. A72-A75. The court explained that the areas in question "are not natural water conditions and are in fact dry most of the year." *Id.* at A74. Because it concluded that the areas at issue were not covered by the Corps' regulation, it declined to reach the question whether the assertion of federal jurisdiction over those areas, based upon their use by migratory birds or endangered species, would have been authorized by the CWA and permitted by the Constitution. *Id.* at A73.

The court of appeals reversed and remanded. Pet. App. A38-A53. The court concluded that neither the artificial origin of the crystallizers and pits nor their seasonal character excludes them from the regulatory definition of "waters of the United States." *Id.*

[6] The Corps asserted jurisdiction over some 110 acres of the property as adjacent wetlands. The parties subsequently agreed that the Corps had jurisdiction over 9 of those acres that are hydrologically connected to Newark Slough and subject to tidal inundation. See Pet. 5 n.3. An additional 80+ acres of "other waters" are no longer at issue. The present case concerns 12.5 acres of "other waters," where the former crystallizers and calcium chloride pits still lie.

at A47-A50. The court also concluded that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at A50. The court of appeals noted, however, that the district court had made no findings regarding the use of the property by migratory birds or endangered species, *ibid.*, and it remanded the case to permit the district court "to determine if the property has the requisite connections to interstate commerce," *id.* at A51.[7] Leslie Salt filed a petition for a writ of certiorari, which this Court denied. *Id.* at A88.

c. On remand, the district court found that roughly 12.5 acres were subject to the Corps' jurisdiction as "other waters." Pet. App. A5. The court noted that the evidence in support of its finding was "summarized in the United States' Memorandum on Remand." *Id.* at A30.[8] The court held that Leslie Salt had violated the CWA in three areas on the property

[7] Judge Rymer dissented, agreeing with the district court's conclusion that the crystallizers and pits were not "other waters" within the meaning of 33 C.F.R. 328.3(a)(3) and therefore were not subject to the Corps' Section 404 jurisdiction. Pet. App. A51-A53.

[8] The record before the district court established that 55 species of birds identified as migratory under 50 C.F.R. 10.13 use various habitats on petitioner's property. Fully two-thirds of the species observed on the site were water-associated birds (ducks, shorebirds, waterbirds and wetland birds). United States Memorandum on Remand at 22-23. The areas of standing water in the former crystallizers and calcium chloride pits receive "significant" numbers of shorebirds and ducks and provide perhaps the full daily requirement of habitat for certain species. *Ibid.*

by discharging fill or altering structures without a permit. *Id.* at A5, A31-A33. Finally, the court ruled that, under Section 309(d) of the CWA, 33 U.S.C. 1319(d),[9] imposition of a civil penalty is mandatory where a statutory violation has been found. Pet. App. A36. The court recognized, however, that the statute "vests wide discretion in [the district] court in setting the amount of the penalties," including the authority to impose "only minimal penalties." *Ibid.* The court deferred ruling as to the amount of the penalty pending receipt of "an appropriate motion for specific penalties" filed by the government. *Ibid.* The parties subsequently stipulated to a penalty of $50,000 and a restoration plan. *Id.* at A5. The stipulation preserved Cargill's right to appeal the issue of whether penalties are mandatory. *Ibid.*

d. A second panel of the court of appeals affirmed. Pet. App. A1-A19. The court first observed that, "[u]nder law of the case doctrine, * * * one panel of an appellate court will not reconsider matters resolved in a prior appeal," *id.* at A5, unless it concludes that the earlier panel's decision was "clearly wrong," *id.* at A8. With respect to each issue that had been resolved in the government's favor on the first appeal, the court unanimously concluded that the earlier panel had not been clearly wrong and declined to overturn the existing law of the case. *Id.* at A8-A14.[10]

[9] Section 309(d) states that "[a]ny person who violates" specified provisions of the CWA "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d).

[10] The court of appeals also addressed the question whether "the preamble to the 1986 regulations promulgated a rule without notice and comment as required by the Administrative Pro-

With respect to the question of penalties, which had not been addressed by the previous panel, the court of appeals affirmed. *Id.* at A15-A17. Section 309(d)'s use of the word "shall," the court reasoned, "means that civil penalties are mandatory." *Id.* at A16. The court noted, however, that "[d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability," *id.* at A16-A17, including the authority to "assess a civil penalty of only a nominal amount," *id.* at A17. Judge O'Scannlain filed a partial dissent, asserting that Section 309(d) "should not be read to require civil penalties in all cases but only where the district court, in its discretion, finds them appropriate." *Id.* at A19.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court, or with any published decision of another court of appeals. Further review is not warranted.

1. Petitioner's "primary submission is that the migratory bird rule is inconsistent with any reasonable interpretation of the Clean Water Act." Pet. 16. We note, as an initial matter, that petitioner's fre-

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cedure Act" by identifying use by migratory birds as a sufficient basis for application of the Section 404 regulations. Pet. App. A8. The earlier court of appeals panel had not discussed the 1986 preamble in its opinion. The second panel concluded, however, that the prior panel had "implicitly rejected all arguments that the rule is invalid for procedural reasons under the Administrative Procedure Act." *Ibid.* The court held that "it is plausible to find that the preamble is merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act," and it therefore rejected petitioner's claim on the basis of law of the case principles. *Id.* at A10.

quent references to "the statutory question" and "the migratory bird rule" (see, *e.g.*, Pet. 16, 22) conflate two distinct issues. First is the question whether the Corps may permissibly construe the term "waters of the United States" to include isolated waters whose destruction or degradation could affect interstate commerce. The second question is whether actual use by migratory birds of particular isolated waters establishes a sufficient nexus to interstate commerce to permit the Corps to exercise Section 404 jurisdiction pursuant to the "other waters" provision of 33 C.F.R. 328.3(a)(3). That aspect of petitioner's challenge is essentially coextensive with petitioner's constitutional claim.

a. Petitioner first contends (Pet. 17-19) that Congress's use of the phrase "navigable waters" precludes application of the CWA to the isolated waters at issue here. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court upheld the Corps' interpretation of the term "waters" to encompass wetlands adjacent to navigable waters and their tributaries. By defining "navigable waters" as "waters of the United States," the Court recognized, "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. The Court made clear that "the term 'navigable' as used in the Act is of limited import." *Ibid.*

In petitioner's view, *Riverside* establishes only that the Corps may regulate "the *edge* of a plainly navigable waterbody, its *adjacent* wetlands." Pet. 17.

Petitioner acknowledges, however, that the focus of the CWA was not on navigability but on "keeping [waters] clean, or making them cleaner—for the benefit of the fish, the waterbirds, and the people who enjoy them." Pet. 19. Accord *Riverside*, 474 U.S. at 133 (noting "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems"); 33 U.S.C. 1251(a)(2) (one purpose of the CWA is to "provide[] for the protection and propagation of fish, shellfish, and wildlife"). Congress understood that concepts of navigability have nothing to do with protecting aquatic ecosystems, and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" that is directly tied to the aquatic values sought to be protected. There is consequently no basis for limiting the Act's coverage to waters that are adjacent to navigable bodies.[11]

b. Petitioner also contends (Pet. 19-21) that the Corps' assertion of Section 404 jurisdiction over isolated waters is inconsistent with the CWA's legislative history. In fact, the history of the CWA's enactment in 1972 and of its amendment in 1977 strongly supports the Corps' approach. The Conference Re-

[11] Petitioner contends that the *Riverside* Court "twice pointedly distinguish[ed] and expressly declin[ed] to approve the Corps regulations extending jurisdiction to isolated waters and wetlands, like the site involved here." Pet. 17 (emphasis omitted). In fact, the Court in *Riverside* expressly declined to address the Corps' authority to regulate *wetlands* not adjacent to other bodies of water, since that question was not presented by the facts of the case. See 474 U.S. at 124 n.2, 131 n.8. The wetlands at issue in *Riverside*, however, were not themselves navigable or the result of inundation by frequent flooding of the adjacent navigable waters. See *id.* at 129-131.

port accompanying the 1972 legislation stated that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Representative Dingell, a co-sponsor of the House bill speaking shortly prior to the CWA's passage, noted with approval that the Act's definition of "navigable waters" "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." 118 Cong. Rec. 33,756 (1972).

That understanding was confirmed by the legislative debates preceding the 1977 amendments to the Act. Congress in 1977 fully realized that the Corps' regulations covered isolated waters. In the House, Representative Abdnor expressed the understanding that under the regulations "the Corps must regulate all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes." 123 Cong. Rec. 34,852 (1977) (extension of remarks). Representatives who favored retaining the broad definition of jurisdiction under Section 404 emphasized the importance of protecting all waters and wetlands. Representative Lehman expressed the view that Section 404, as construed in the Corps' regulations, "is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless esthetic and recreation benefits." *Id.* at 10,415. In support of continued coverage of "inland wetlands," Representative Steers inserted a statement by the Chairman of the Council on

Environmental Quality pointing out that "[w]etlands, better known by such names as swamps, bogs, marshes, potholes, wet meadows and river outflow land," provide flood control, water purification, and "essential habitat in the life cycle of many birds and fish." *Id.* at 30,994-30,995.

The Senate bill did not attempt to restrict the Corps' broad assertion of jurisdiction. See S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977). Instead, the Committee incorporated the existing regulatory scheme into an amendment authorizing assumption by the States of some aspects of the Section 404 program. § 404(g), 33 U.S.C. 1344(g). The Senators clearly understood what was at stake. Senator Bentsen opposed the committee bill because it

> skirts the fundamental problem: the definition of Federal jurisdiction in the regulation of dredge and fill activities. The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies.

123 Cong. Rec. 26,711 (1977). Senator Tower similarly objected to affirming the Corps' regulatory scheme, "which," he said, "covers not just the rivers of the Nation but all surface waters and wetlands of the United States." *Id.* at 26,722.

As this Court observed in *Riverside*, "[t]he Conference Committee adopted the Senate's approach: efforts to narrow the definition of 'waters' were abandoned." 474 U.S. at 137. Congress determined that the Corps would retain jurisdiction over isolated waters; in addition, exemptions for discharges from activities such as the construction of stock ponds and sedimentation basins were created. H.R. Conf. Rep.

No. 830, 95th Cong., 1st Sess. 100-101 (1977). As Senator Baker explained:

> [T]he conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the [Clean Water Act] to control pollution to the fullest constitutional extent. A permit program will continue to regulate dredge or fill material discharged into all our Nation's waters.

123 Cong. Rec. 39,209 (1977). In sum, Congress "acquiesced in the administrative construction," *Riverside*, 474 U.S. at 136; its refusal to divest the Corps of jurisdiction over isolated waters is evidence of the reasonableness of the Corps' approach, "particularly where the administrative construction [was] brought to Congress' attention through legislation specifically designed to supplant it." *Id.* at 137; see generally *id.* at 135-137 (recounting history of 1977 amendments).

c. The Court in *Riverside* gave deference to the views of the Corps and the EPA, recognizing "the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 134. Petitioner acknowledges (Pet. 21) that the principle of deference to administrative agencies is generally applicable to the Corps' interpretation of the CWA. Petitioner contends, however, that little or no deference is warranted in the present case, on the ground that the Corps' assertion of regulatory jurisdiction based on the presence of migratory birds "involves a change of position that does not result from careful reconsideration based on experience, but is forced on the agency by the relentless pressure of two powerful Senators." Pet. 21 (citing *Oversight*

Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. (1985) (*1985 Oversight Hearings*)). That allegation is without basis. The record of the 1985 oversight hearings makes clear—as this Court recognized in *Riverside*, 474 U.S. at 134-135—that the Corps and the EPA had asserted regulatory jurisdiction over isolated waters on the basis of migratory bird use (among other factors) long before 1985. At issue in 1985 was the *manner* in which the Corps had been exercising that jurisdiction—specifically, by requiring evidence of actual (and in some cases extensive) use by migratory birds. *1985 Oversight Hearings* 122-123. The Acting Assistant Secretary of the Army for Civil Works made clear that "the Corps of Engineers generally does accept the notion that migratory waterfowl [use] does constitute a nexus with interstate commerce." *Id.* at 168. The question was simply "the extent of use by migratory fowl." *Id.* at 115; see also *id.* at 123 (the question is "how many ducks"); see also *Utah* v. *Marsh*, 740 F.2d 799 (10th Cir. 1984) (upholding assertion of Corps' jurisdiction over an intrastate body of water in part on the basis of migratory bird use); *1985 Oversight Hearings* 114, 121, 208. There is consequently no merit to petitioner's contention that the agencies' policy with respect to migratory birds represents a recent and/or unexplained departure from earlier practice.

In any event, petitioner does not contend that the Corps' assertion of Section 404 jurisdiction over isolated waters is of recent vintage. No such contention would be plausible: As early as 1977, the Corps' regulations defined the term "waters of the

United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978). Nor has petitioner suggested any other basis upon which this Court could decline to accord deference to the Corps' determination that isolated waters whose degradation or destruction could affect interstate commerce are subject to Section 404's permitting requirements. The question concerns the interpretation of a statute that the Corps (along with the EPA) is charged with administering; to the extent that the text and history of the Act fail to provide a definitive resolution, the agencies' construction of the phrase "waters of the United States" must be upheld so long as it is reasonable. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).[12]

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[12] The courts of appeals have repeatedly held that Congress intended in the CWA to exercise the full extent of its Commerce Clause powers over the nation's waters, unlimited by traditional concepts of navigability. See, *e.g.*, *United States* v. *City of Fort Pierre*, 747 F.2d 464, 465 (8th Cir. 1984); *Utah* v. *Marsh*, 740 F.2d at 802 (citing cases); *United States* v. *Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979). Indeed, petitioner identifies no court that has accepted the contention that "waters of the United States" are limited to navigable waters and their adjacent wetlands. Petitioner's reliance (see Pet. 18-19) on *Federal Power Comm'n* v. *Union Electric Co.*, 381 U.S. 90 (1965), is misplaced. The Court in *Union Electric* indicated in passing that the term

d. Finally, there is no merit to petitioner's suggestion (Pet. 16-17) that this Court should avoid the constitutional issue presented in this case by construing the term "waters of the United States" as limited to navigable waters and their adjacent wetlands. The agencies charged with administration of the CWA have adopted a substantially broader reading of the pertinent language; Congress has acquiesced in that reading (see *Riverside*, 474 U.S. at 135-139); petitioner cites no decision adopting its reading of the statutory term; and the courts of appeals have repeatedly held (see note 12, *supra*) that Congress intended to exercise the full extent of its authority under the Commerce Clause. There is, moreover, no plausible *constitutional* objection to the Corps' assertion of regulatory jurisdiction over waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3). Petitioner's constitutional challenge is not to the Corps' determination that "waters of the United States" include isolated waters the use or destruction of which could affect interstate commerce. Rather, its constitutional challenge is limited to a single application of the "other waters" provision. Petitioner's contention that the presence of migratory birds affords an insufficient nexus to interstate commerce provides no basis for

"nonnavigable streams," as used in the Federal Water Power Act, encompassed "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Id.* at 97. *Union Electric* did not address (and indeed antedated) the CWA, and it construed the term "streams," rather than "waters."

invalidating the "other waters" provision in its entirety.

2. Relying exclusively on *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), petitioner contends (Pet. 15) that "the migratory bird rule, as applied here, reaches well beyond the zone of activity that affects interstate commerce" and is therefore unconstitutional.[13]

a. Migratory birds have long been viewed as an important article of interstate and foreign commerce. See *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'"); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed").[14] "Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." *Hoffman Homes, Inc.* v. *EPA*, 999 F.2d 256, 261 (7th Cir. 1993). The courts have also recognized the importance of habitat protection as a means of preventing the depletion of bird populations. See, *e.g.*, *ibid.* (noting that "cumulative loss of wetlands has

[13] This Court's opinion in *Lopez* was submitted to the court below as a supplemental authority some four weeks before the opinion issued. See Pet. 9.

[14] See also *Cerritos Gun Club* v. *Hall*, 96 F.2d 620 (9th Cir. 1938) (regulation prohibiting baiting to lure migratory waterfowl in their migration is valid regulation of "commerce"); *Cochrane* v. *United States*, 92 F.2d 623, 626-627 (7th Cir. 1937) (recognizing Congress's power to regulate migratory birds under the Commerce Clause as "a national interest of very nearly the first magnitude * * * [that] can be protected only by national action") (quoting *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920)), cert. denied, 303 U.S. 636 (1938).

reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"); *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 986 (D.C. Cir. 1975) ("Research and experience have demonstrated that habitat is the key factor limiting most, if not all, migratory bird populations." (citation omitted)).[15] Indeed, petitioner cites no decision holding that protection of wildlife bears a constitutionally insufficient nexus to interstate commerce.[16]

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[15] See also Harold A. Kantrud *et al.*, U.S. Fish and Wildlife Service Biological Report 85(7.28), *Prairie Basin Wetlands of the Dakotas: A Community Profile* 46-55 (1989) (prairie pothole wetlands, frequently seasonal, provide important habitat for numerous species of waterfowl and other migratory birds). Indeed, migratory bird habitat protection has been deemed of such importance that several statutes and at least two international treaties address the problem. See, *e.g.*, The North American Wetlands Conservation Act, 16 U.S.C. 4401-4413 (Supp. V 1993); 16 U.S.C. 4401(b) (Supp. V 1993) (purpose of the Act is to enhance the protection of wetlands, which serve as habitat to migratory waterfowl and other birds, in effort to increase their populations); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, United States-Japan, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990; Convention Concerning the Conservation of Migratory Birds and Their Environment, United States-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647, T.I.A.S. No. 9073.

[16] In *Palila* v. *Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 994-995 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981), the district court held that Congress's power to regulate interstate commerce provided a constitutionally sufficient basis for the Endangered Species Act. The court noted Congress's finding that endangered "species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 471 F. Supp. at 994. It then observed that "a natural program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction." *Id.* at 995. Accord *Hoffman Homes*, 999 F.2d at 261 (protection of wildlife is valid basis for regulation under the Commerce Clause); *United States* v. *Sargent County Water Resource District*, 876 F. Supp. 1081, 1087 (D.N.D. 1992) (same). Cf. *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407 (1995) (upholding the Secretary of the Interior's interpretation of "harm" to endangered species to include "significant habitat modification or degradation where it actually kills or injures wildlife").

b. This Court's decision in *Lopez* is not to the contrary. Although the Court declined to permit an "additional expansion" of Commerce Clause power beyond that recognized in earlier decisions, see 115 S. Ct. at 1634, it overruled no precedents and emphasized the consistency of its approach with that of prior decisions, *id.* at 1629-1634. The Court reaffirmed, in particular, that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 1629-1630 (citation omitted).[17] The Court in *Lopez* thus did not call into question the

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[17] The particular regulated conduct at issue in this case, moreover, clearly constitutes economic activity. Petitioner (like its corporate predecessor Leslie Salt) wishes to fill the pits and crystallizers not so that the land can be put to personal use, but to facilitate the conduct of a commercial enterprise. See Pet. App. A58 (noting that the property in question "is obviously a valuable piece of commercial real estate, and Leslie seeks to develop it").

basis for the recognition in many prior decisions (see pages 19-20 and note 16, *supra*) that a potential deleterious impact on wildlife furnishes a constitutionally sufficient ground for regulation under the Commerce Clause.

c. Petitioner also contends (Pet. 15) that the filling of migratory bird habitat in this particular case would have no substantial impact on interstate commerce. It is a well settled principle, however, that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (internal quotation marks omitted). The Court specifically reaffirmed that principle in *Lopez*, quoting with approval its prior statement that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968) (quoted in *Lopez*, 115 S. Ct. at 1629).

The CWA and the Corps' regulations, moreover, do not establish an absolute prohibition on the discharge of pollutants into isolated waters frequented by migratory birds. The issue in this case is whether the Corps may, consistent with the CWA and the Constitution, assert *jurisdiction* over the waters in question. Where waters covered by the Corps' definition are "lacking in importance to the aquatic environment—or where [their] importance is outweighed by other values—the Corps may always allow development * * * simply by issuing a permit." *Riverside*, 474 U.S. at 135 n.9. Having eschewed any effort to obtain a permit, petitioner should not be

heard to attack the regulation on the ground that the proposed activity would have insubstantial effects on migratory birds. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-194 (1985).[18]

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[18] Congressional power with respect to the conservation of wildlife generally, including migratory birds, has also long been upheld as a valid exercise of the federal government's authority to make and implement treaties. See Art. II, § 2, Cl. 2. In *Missouri* v. *Holland*, 252 U.S. 416 (1920), the Court upheld, against a Tenth Amendment challenge, a treaty between the United States and Great Britain providing protections for migratory birds. The Court also upheld the Migratory Bird Treaty Act of July 3, 1918, ch. 128, 40 Stat. 755, a statute designed to implement the treaty; the Court observed that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. Under a treaty with Japan, the United States has agreed to "endeavor to take appropriate measures to preserve and enhance the environment of birds protected under" the treaty and is obligated in particular to "[s]eek means to prevent damage to such birds and their environment." See Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, United States-Japan, Mar. 4, 1972, 25 U.S.T. 3335, T.I.A.S. No. 7990. The black-bellied plover, a species protected under the treaty with Japan, has been identified by petitioner's consultant as using the waters at issue. See 25 U.S.T. 3340; Tr. Exh. 597, Table 1, at 5. See also Convention Concerning the Conservation of Migratory Birds and Their Environment, United States-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647, 4653, T.I.A.S. No. 9073 ("To the extent possible, the Contracting Parties shall undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of that environment."); Convention Between the United States of America and the United Mexican States for the Protection

3. Petitioner contends (Pet. 23-24) that the "migratory bird rule" is invalid because it was not promulgated in accordance with the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)-(d). That claim is without merit.

a. Regulations promulgated by the Corps in 1977 pursuant to APA notice-and-comment procedures unequivocally asserted Section 404 jurisdiction over isolated waters "the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978); see pages 4-5, *supra*. The agency made clear at that time that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal Government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978). If (as we contend) the presence of migratory birds furnishes a constitutionally sufficient nexus to interstate commerce, the waters at issue here were subject to the Corps' jurisdiction under the terms

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of Migratory Birds and Game Mammals, Feb. 7, 1936, 9 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1017, 1017-1018 (1972) (contracting parties "declare that it is right and proper to protect [migratory] birds * * * by means of adequate methods which will permit * * * the utilization of said birds rationally for the purposes of sport, food, commerce and industry"); 51 Fed. Reg. 41,217 (1986) ("waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties"). Application of Section 404's requirements to waters used by migratory birds is therefore a lawful means of implementing this country's treaties as well as a permissible exercise of the commerce power.

of the regulation itself. Neither the 1986 *Federal Register* preamble (see pages 5-6, *supra*) nor any statements of Corps officials at the 1985 oversight hearings (see Pet. 21, 24; page 16, *supra*)[19] created new duties or requirements; rather, the preamble and official testimony simply delineated the Corps' understanding as to the areas to which existing duties and requirements applied.[20] The 1986 preamble is therefore an interpretive rule—one that explains "what the administrative officer thinks the statute or regulation means," and "merely clarif[ies] or explain[s] existing law or regulations," *Alcaraz* v. *Block*, 746 F.2d 593, 613 (9th Cir. 1984); see also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979)—and is not subject to the APA's notice-and-comment requirement. See 5 U.S.C. 553(b)(3)(A).

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[19] The court of appeals understood petitioner's argument to be that "the preamble to the 1986 regulations promulgated a rule without notice and comment as required by the Administrative Procedure Act." Pet. App. A8. The petition, however, refers to "the 1985 Subcommittee Hearings at which the migratory bird rule was invented." Pet. 21; see also Pet. 23-24 (arguing that "the adoption of the migratory bird rule in 1985 effected a new, and massive, extension of regulatory jurisdiction by the Corps of Engineers and EPA"). Those statements suggest that petitioners regard the testimony of Corps officials at the 1985 oversigh hearings as effecting the adoption of a substantive rule for which notice-and-comment procedures should have been utilized.

[20] Cf. *Hoffman Homes*, 999 F.2d at 261 ("it is reasonable to *interpret* the regulation as allowing migratory birds to be [the] connection between [waters of the United States] and interstate commerce") (emphasis added); *Rueth* v. *EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("one test for whether the [water] affects interstate commerce is whether migratory birds use the [water]").

b. There exists no circuit conflict warranting review by this Court. Petitioner relies (Pet. 23) on an unpublished decision of a split panel of the Fourth Circuit. *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (Table). In *Tabb Lakes*, the district court held that a 1985 memorandum issued by the Corps' headquarters to its district offices, explaining that bodies of water inhabited by migratory birds are subject to Section 404 jurisdiction, was a substantive rule that could be adopted only through notice-and-comment procedures. 715 F. Supp. at 728-729. The court of appeals, with one judge dissenting, issued an unpublished per curiam opinion "affirm[ing] on the district court's opinion." *Tabb Lakes, Ltd.* v. *United States*, 20 Envtl. L. Rptr. (Envtl. L. Inst.) 20,008, 20,009 (4th Cir. Sept. 19, 1989). Because the Fourth Circuit's opinion is unpublished, the conflict does not warrant this Court's review. Cf. Fourth Circuit IOP 36.6. Indeed, the Fourth Circuit has subsequently held that the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989), an interagency document providing guidance for the identification of wetlands subject to federal regulatory jurisdiction, was interpretive rather than legislative in nature. *United States* v. *Ellen*, 961 F.2d 462, 465-466 (4th Cir.), cert. denied, 113 S. Ct. 217 (1992).[21] The court reached that conclusion despite

[21] The *Ellen* court addressed the issue in the context of an Ex Post Facto challenge to a criminal conviction. 961 F.2d at 465-466. The court determined that the applicability of the Ex Post Facto Clause "depends on whether the *1989 Manual* is a legislative rule or merely an interpretive guide," *ibid.*, and it concluded that "the four agencies that promulgated the *1989 Manual* intended it to be only an interpretive guide to the regulatory definition of wetlands," *id.* at 466.

the fact that "[a]pplication of the *1989 Manual* resulted in a significant increase in lands identified as wetlands as compared with the EPA and Corps manuals." *Id.* at 465.

4. Finally, petitioner (Pet. 24-27) seeks review of the court of appeals' determination that imposition of a civil penalty is mandatory where a district court finds a violation of the CWA.

a. Section 309(d) of the CWA states that "[a]ny person who violates [Section 301 of the CWA] *shall* be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d) (emphasis added). Section 309(d) further provides that "[i]n determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations," as well as other specified factors including "any good-faith efforts to comply with the applicable requirements" and "such other matters as justice may require." *Ibid.* The statutory language demonstrates that Congress intended civil penalties to be mandatory, and that equitable factors are to be considered only in determining the "amount" of the penalty.[22] Petitioner relies on dicta from a number of decisions (see Pet. 25-26), but it identifies no case holding that Section 309(d) permits a district court to decline to impose a civil penalty after a statutory

[22] Section 309(g)(1) of the Act, by contrast, which governs administrative penalties, provides that the EPA or the Corps "*may* * * * assess a * * * penalty," for violation of the statute or a permit. 33 U.S.C. 1319(g)(1) (emphasis added). That difference in the wording of another subsection of 33 U.S.C. 1319 further confirms the plain meaning of the provision at issue here.

violation has been found. The only other court of appeals squarely to address the question has held that imposition of a civil penalty is mandatory after a CWA violation has been established. See *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990) (plain language of Section 309(d) "makes clear that once a violation has been established, some form of penalty is required"); accord *Hawaii's Thousand Friends* v. *City & County of Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993); *Atlantic States Legal Found., Inc.* v. *Universal Tool & Stamping Co.*, 786 F. Supp. 743, 754 (N.D. Ind. 1992); *Natural Resources Defense Council, Inc.* v. *Texaco Refining & Marketing, Inc.*, 800 F. Supp. 1, 22 (D. Del. 1992), aff'd in part, rev'd in part on other grounds, 2 F.3d 493 (3d Cir. 1993).[23]

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[23] We agree with petitioner (see Pet. 24-25) that *Stoddard* v. *Western Carolina Regional Sewer Auth.*, 784 F.2d 1200 (4th Cir. 1986), contains no unequivocal holding that civil penalties are mandatory under Section 309(d). Petitioner's reliance (see Pet. 25) on *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977), however, is misplaced. In *Train*, Virginia officials sought a declaratory judgment that particular CWA restrictions were inapplicable to publicly owned sewage treatment plants that had not received federal grants. *Id.* at 922. The district court denied the requested relief, and the court of appeals affirmed. *Id.* at 923. In the course of its opinion, the court of appeals stated in passing that in CWA enforcement proceedings "the courts retain equitable discretion to determine whether and to what extent fines and injunctive sanctions should be imposed for violations brought about by good faith inability to comply with the deadline." *Id.* at 927. That statement was dictum, however, since *Train* did not involve either a judicial finding that a CWA violation had occurred or a request for civil penalties. In any event, the Fourth Circuit has subsequently read *Train* to hold only that a court has discretion to determine the amount of a penalty. See *Stoddard*, 784 F.2d at 1208-1209.

b. In any event, petitioner's claim does not warrant review by this Court. Judge O'Scannlain, who dissented on this issue, recognized that, "[u]ndoubtedly, civil penalties will be imposed in most cases of proven violations of the Act." Pet. App. A19. For its part, the majority observed that "[d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability," including the discretion to "assess a civil penalty of only a nominal amount." *Id.* at A16-A17. Thus, the only practical consequence of this aspect of the court of appeals' decision is that in a small subset of CWA cases, district courts will assess nominal civil penalties rather than no penalties at all. The issue therefore does not warrant this Court's review (at least in the absence of a conflict in the circuits).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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